A

SIK HONG PHOTO SDN BHD

v.

CH'NG BENG CHOO

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
KANG HWEE GEE JCA
AZHAR MA'AH JCA
[CIVIL APPEAL NO: P-02-412-2004]

C

3 FEBRUARY 2010

CONTRACT: *Breach - Acquiescence and waiver - Breach of property sale and purchase agreement - Purchaser delaying completion - Whether delay was acquiesced or waived by seller*

D

CONTRACT: *Breach - Property sale and purchase agreement - Failure by purchaser to settle consideration for purchase of property - Total failure of consideration - Whether fundamental breach of contract - Whether seller could rescind agreement and recover property - Whether parties to be restored to original position before contract - Contracts Act 1950, s. 40*

E

CONTRACT: *Breach - Remedies - Rescission, right of - Whether contract may be rescinded in cases of total failure of consideration*

CONTRACT: *Sale and purchase of property - Time of essence - Delay*

F

in completion - Failure of consideration - Whether purchaser could rescind agreement - Sections 40, 56(1) Contracts Act 1950 - Whether to be read conjunctively

CONTRACT: *Uncertainty - Terms - Sale and purchase of property -*

G

Consideration payable by way of transfer of shares in company at an undetermined date - Whether contract void for uncertainty - Whether attracting remedy of restitution or compensation - Contracts Act 1950, ss. 30, 66

H

The plaintiff/respondent was the daughter of one Madam Ng Hua (deceased). The defendant/appellant was their family concern. During her lifetime, the late Madam Ng entered into a sale and purchase agreement ("the SPA") with the defendant to sell a piece of landed property ("the property") to the defendant for RM43,000, which was to be settled by a transfer to Madam Ng of the shares in the

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defendant ("the consideration") on or before 31 December 1980 ("the completion date"). Although the defendant had not transferred the consideration to Madam Ng, the defendant had already taken

vacant possession of the property before the completion date. Several years later the defendant passed two resolutions for the purpose of transferring the shares to Madam Ng. The defendant prepared and executed the transfer forms, but they were never sent to Madam Ng for execution. As there had never been any transfer of the shares, Madam Ng complained that the defendant had breached the SPA and demanded that vacant possession of the property be re-delivered to her. Upon the demise of Madam Ng, her daughter Ch'ng Beng Choo was substituted as the plaintiff. The High Court gave judgment for the plaintiff, declaring that the SPA was null and void. The defendant appealed on the grounds that: (i) Madam Ng had consented to or by acquiescence agreed that the transfer of the shares to her was to be deferred to an unspecified date; and (ii) the defendant was ready to perform its obligations under the SPA.

Held (dismissing the appeal)
Per Low Hop Bing JCA delivering judgment of the court:

(1) Clause 3 of the SPA expressly provided that "The sale and purchase shall be completed on or before 31 December 1980". Under cl. 3, the parties had expressly stipulated and agreed on the date of completion. That stipulation was couched in peremptory language, and required the mandatory completion of the sale and purchase on or before 31 December 1980. The intention of the parties was to complete the sale and purchase of the property on or before 31 December 1980. Hence, pursuant to cl. 3, the parties had agreed that time was of the essence thereof. (para 15)

(2) The issue of acquiescence and waiver is to be determined by reference to the evidence adduced at the trial. On the facts, no acquiescence and waiver could be attributed to Madam Ng. (paras 18 & 21)

(3) The defendant's failure to transfer the consideration (the shares) to Madam Ng constituted a total failure of consideration on the part of the defendant. The first limb of s. 40 of the Contracts Act 1950 (the Act) (but not the exception thereto) therefore applied. There was total non-performance by the defendant of the obligation to transfer the shares to Madam Ng under the SPA. Madam Ng, being the promisee, could put an end to the SPA and the defendant should not be unjustly enriched under

A the SPA by retaining the property. (paras 23 & 24)

(4) The essence of time in the SPA comes under s. 56(1) of the Act and the failure of consideration is within the ambit of s. 40 of the Act. Section 40 must be read conjunctively with s. 56(1) when determining whether the defendant as a promisor had committed a breach of such a nature that went to the root of the contract *ie*, a fundamental breach. (para 26)

(5) The transfer of the consideration was a 'fundamental term', a breach of which constituted a fundamental breach. The defendant's fundamental breach had deprived Madam Ng of the fundamental benefits under the SPA entitling her to rescind the contract and to have the parties restored to a position where they will stand as if the SPA had never been made. (para 27)

(6) There is at common law a right to rescind a contract in very limited circumstances. In essence, it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration. (para 28)

(7) The defendant's contention, that Madam Ng had, by acquiescence, agreed that the transfer of the shares to her was to be deferred to an unspecified date, clearly militated against its own case. That contention unequivocally led to the result that the date of the transfer was to be kept at large or postponed *ad infinitum*. The words "to be deferred to an unspecified date" create an element of uncertainty in the contract, and so s. 30 of the Act was invoked. This brought into focus s. 66 of the Act which provided for the remedy of restitution or compensation in favour of Madam Ng. (paras 30 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/responden adalah anak perempuan kepada seorang Madam Ng Hua ('simati'), sementara defendan/perayu adalah perniagaan keluarga mereka. Semasa hayatnya, mendiang Madam Ng telah memeterai satu perjanjian jual beli ('PJB') dengan defendan bagi menjual sebidang hartanah ('hartanah') kepada defendan pada harga RM43,000, yang mana akan dibayar melalui pemindahan saham-saham defendan kepada Madam Ng ('balasan') pada atau sebelum 31 Disember 1980 ('tarikh penyempurnaan'). Walaupun defendan

tidak memindahkan saham-saham kepada Madam Ng, defendan telah mengambil milikan kosong hartanah sebelum tarikh penyempurnaan. Beberapa tahun kemudian, defendan telah meluluskan dua resolusi bagi maksud memindahkan saham-saham kepada Madam Ng. Berikutnya, defendan menyediakan dan memeterai borang pindahmilik, tetapi kesemua itu tidak dihantar kepada Madam Ng untuk dimeterai oleh beliau. Oleh kerana tidak wujud sebarang pindahmilik saham-saham, Madam Ng mengadu bahawa defendan telah melanggar PJB sekaligus menuntut supaya milikan kosong hartanah dikembalikan kepadanya. Selepas kematian Madam Ng, anak perempuan beliau Ch'ng Beng Choo telah digantikan sebagai plaintif. Mahkamah Tinggi telah memberi penghakiman kepada plaintif, dan mengisytiharkan PJB sebagai batal dan tak sah. Defendan merayu atas alasan bahawa: (i) Madam Ng memberi persetujuan atau secara akuiesens bersetuju bahawa pindahmilik saham-saham kepada beliau ditangguh ke suatu tarikh yang tidak ditetapkan; dan (ii) defendan sentiasa bersedia untuk melaksanakan obligasinya di bawah PJB.

Diputuskan (menolak rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Fasal 3 SPA secara ekspres memperuntukkan bahawa "Jual beli hendaklah disempurnakan pada atau sebelum 31 Disember 1980". Maka di bawah fasal 3, pihak-pihak secara jelas berbicara mengenai tarikh penyempurnaan dan bersetuju dengannya. Pernyataan tersebut dibuat melalui bahasa yang tegas dan mengkehendaki penyempurnaan mandatori jual beli pada atau sebelum 31 Disember 1980. Niat pihak-pihak adalah untuk menyempurnakan jual beli hartanah pada atau sebelum 31 Disember 1980. Oleh itu, berdasarkan fasal 3, pihak-pihak telah bersetuju bahawa masa merupakan intipati kontrak.

(2) Isu akuiesens dan penepian harus diputuskan dengan merujuk kepada keterangan-keterangan yang dikemukakan di perbicaraan. Berdasarkan fakta, tiada akuiesens atau penepian boleh dikaitkan kepada Madam Ng.

(3) Kegagalan defendan untuk memindahmilik balasan (saham-saham) kepada Madam Ng adalah satu kegagalan balasan total di pihak defendan. Dengan itu, jejari pertama s. 40 Akta

Kontrak 1950 (Akta) (bukan pengecualian di situ) adalah terpakai. Jelas bahawa wujud kegagalan pelaksanaan obligasi yang total oleh defendan untuk memindahmilik saham-saham kepada Madam Ng di bawah PJB. Sebagai penerima janji, Madam Ng boleh menamatkan PJB dan defendan tidak boleh diperkaya dengan secara tidak wajar di bawah PJB dengan terus memegang hartanah.

(4) Peri kepentingan masa di dalam PJB adalah tertakluk di bawah s. 56(1) Akta sementara kegagalan balasan pula termasuk di bawah s. 40 Akta. Seksyen 40 hendaklah dibaca secara konjunktif dengan s. 56(1) dalam menentukan sama ada defendan selaku pemberi janji telah melakukan pelanggaran yang sebegitu rupa sehingga menjejaskan umbi kontrak, yakni satu pelanggaran kontrak yang fundamental.

(5) Pindahmilik balasan adalah suatu 'terma fundamental', dan pelanggarannya adalah juga satu pelanggaran fundamental. Pelanggaran yang fundamental oleh defendan telah menafikan manfaat-manfaat fundamental kepada Madam Ng di bawah PJB, sekaligus memberikannya hak untuk membatalkan kontrak dan mengembalikan pihak-pihak ke kedudukan asal seolah-olah PJB tidak pernah dimeterai.

(6) Di sisi undang-undang common, hak untuk membatalkan kontrak wujud dalam halkeadaan-halkeadaan yang sangat terhad. Dalam kes-kes di mana terdapat kegagalan balasan yang total, remedi pada asasnya hanyalah remedi quasi-kontraktual restitusi.

(7) Hujah defendan bahawa Madam Ng, melalui akuiesens, telah bersetuju bahawa pindahmilik saham-saham kepada beliau ditangguhkan ke suatu tarikh yang tidak ditetapkan, jelas bercanggah dengan kes defendan sendiri. Hujah tersebut secara nyata membawa kepada akibat bahawa tarikh pindahmilik adalah tidak menentu atau ditangguhkan *ad infinitum*. Perkataan "hendaklah ditangguh ke suatu tarikh yang tidak ditetapkan" telah mewujudkan elemen ketidakpastian di dalam kontrak, dan sekaligus membangkitkan pemakaian s. 30 Akta. Ini sekaligus mengalihkan perhatian kepada s. 66 Akta yang memberikan

remedi restitusi atau pampasan kepada Madam Ng. A

Case(s) referred to:

Ajit v. Sammy [1967] 1 AC 255 ***(refd)***
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Brickles v. Snell [1916] 2 AC 599 ***(refd)*** B
Chia See Yin v. Yeoh Kooi Imm [1997] 5 CLJ 111 HC ***(refd)***
Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd [1988] 1 LNS 213 HC ***(refd)***
Compton v. Bagley [1892] 1 Ch 313 ***(refd)***
Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour [1943] AC 32 ***(refd)*** C
Green v. Sevin [1879] 13 Ch D 589 ***(refd)***
Hare v. Nicoll [1966] 2 QB 130 ***(refd)***
Harold Wood Brick Co Ltd v. Ferris [1935] 2 KB 198 ***(refd)***
Hudson v. Temple [1860] 29 Beav 536 ***(refd)***
King's Motors (Oxford) Ltd v. Lax [1969] 3 All ER 665 ***(refd)*** D
Law Ngei Ung & Anor v. Tamansuri Sdn Bhd [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44 HC ***(refd)***
Lock v. Bell [1931] 1 Ch 35 ***(refd)***
Macbryde v. Weekes [1956] 22 Beav 533 ***(refd)***
Mistaria Sdn Bhd v. Evergreen Furniture Industries Sdn Bhd [1999] 1 LNS 127 HC ***(refd)*** E
Mussen v. Van Diemen's Land Co [1938] Ch 253 ***(refd)***
Photo Production Ltd v. Securicor Transport Ltd [1980] 2 WLR 283 ***(refd)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***
Smith v. Hamilton [1951] Ch 174 ***(refd)*** F
Smith v. Morgan [1971] 2 All ER 1500 ***(refd)***
Steedman v. Drinkle [1916] 1 AC 275 ***(refd)***
Stickney v. Keeble [1915] AC 386 ***(refd)***
Re Barr's Contract [1956] Ch 551 ***(refd)***
Reuter v. Sala [1879] 4 CPD 239 ***(refd)*** G
Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 HC ***(refd)***
United Scientific v. Burnley Council [1978] AC 904 ***(refd)***
Wisma Sime Darby Sdn Bhd v. Wilson Parking Malaysia Sdn Bhd [1996] 4 CLJ 194 CA ***(refd)***
Zainal Abidin v. Century Hotel Sdn Bhd [1986] 1 LNS 2 SC ***(refd)*** H

Legislation referred to:

Contracts Act 1950, ss. 30, 40, 56(1), 66

Other source(s) referred to: I

A *Halsbury's Laws of England,* vol 4, para 1179

For the appellant - Hardeep Singh (Richard Huang with him); M/s Peter Huang & Richard
For the respondent - Daphne Choy; M/s Choy & Assoc

B *[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-251-1989]*

Reported by Amutha Suppayah

C

JUDGMENT

Low Hop Bing JCA:

Appeal

D **[1]** After a full trial, the learned judicial commissioner gave judgment for the respondent ("the plaintiff"), declaring that the sale and purchase agreement ("the SPA") executed between the plaintiff and the appellant, a company incorporated under the Companies Act 1965 ("the defendant") on 31 October 1980 was null and void.
E There were also consequential orders for the return of property to the plaintiff and an account for rentals commencing 31 December 1980.

[2] On appeal, the High Court judgment was affirmed by us.

F **[3]** We now provide our grounds.

Defence

[4] In essence, the defendant's amended defence is that:

G (1) Madam Ng Hua (Madam Ng) had consented to and/or, by acquiescence, agreed that the transfer of fully paid 430 shares ("the shares") to her was to be deferred to an unspecified date;

(2) The defendant was ready to perform its obligations under the
H SPA; and

(3) In 1987, the defendant had prepared the transfer forms to

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transfer the shares to Madam Ng.

Undisputed Facts

[5] The plaintiff and one Ch'ng Beng Leong, the managing director of the defendant, are the lawful daughter and son respectively of Madam Ng (decd) and her husband Ch'ng Gim Chuan (decd). The defendant is a family concern, of which Ch'ng Gim Chuan (decd) was the chairman.

[6] During her lifetime, the late Madam Ng entered into "the SPA" with the defendant to sell the land together with the premises erected thereon at No. 56, Kinta Lane, Penang, ("the property") to the defendant at a consideration of RM43,000, which was to be settled by a transfer to Madam Ng of the shares in the defendant at RM100 per share ("the consideration") on or before 31 December 1980 ("the completion date").

[7] Although the defendant had not transferred the consideration to Madam Ng, the defendant had already taken vacant possession of the property before the completion date.

[8] The defendant's chairman died on 17 January 1986 and the defendant passed two resolutions for the purpose of transferring the shares to Madam Ng. The defendant prepared and executed the transfer forms, but they were never sent to Madam Ng for execution. As there had never been any transfer of the shares, Madam Ng complained that the defendant had breached the SPA and demanded that vacant possession of the property be re-delivered to her, with an account for rentals.

[9] Upon the demise of Madam Ng (who had initiated the action herein), her daughter Ch'ng Beng Choo was substituted as the plaintiff.

Time Of The Essence

[10] Defendant's learned counsel Mr Hardeep Singh (assisted by Mr Richard Huang) argued, *inter alia*, that time was not of the essence of the SPA.

[11] Ms Daphne Choy submitted for the plaintiff that time was of the essence as the parties have expressly agreed on the completion date in the SPA.

[12] The learned judicial commissioner had sustained the plaintiff's submission.

[13] In the instant appeal, the question for determination under this head revolves around the true construction of the SPA in order to determine whether time was of the essence thereof.

[14] On this issue, it is useful for us to set out the relevant principles as follows:

(1) The expression "time is of the essence" means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract: *Halsbury's Laws of England*, vol. 4, para 1179.

(2) Section 56(1) of the Contracts Act 1950 provides that "When a party to a contract promises to do a certain thing at or before a spesified time or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract." In other words, a stipulation as to time is of the essence of the contract if the parties so agree: *Chia See Yin v. Yeoh Kooi Imm* [1997] 5 CLJ 111, 120 HC, per Abdul Malik Ishak J (now JCA) who referred to *Steedman v. Drinkle* [1916] 1 AC 275; *Brickles v. Snell* [1916] 2 AC 599; *Mussen v. Van Diemen's Land Co.* [1938] Ch 253 and *Harold Wood Brick Co. Ltd v. Ferris* [1935] 2 KB 198. See also *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363, 366 FC; and *United Scientific v. Burnley Council* [1978] AC 904 at 940 & 944. (A reference hereinafter to a section is a reference to that section in the Contracts Act 1950, unless otherwise stated).

(3) Where time was not incorporated as the essence of the contract but in due course it has been made part and parcel of the contract by one party giving a notice to the other, after the party has been guilty of unreasonable delay and it follows, as the night the day, that the time mentioned in the notice must be reasonable: per Abdul Malik Ishak J (now JCA) in *Chin See Yin, supra; Green v. Sevin* [1879] 13 Ch D 589; *Compton v. Bagley* [1892] 1 Ch 313; *Stickney v. Keeble* [1915] AC 386; *Smith v. Hamilton* [1951] Ch 174 and *Re Barr's Contract* [1956] Ch 551. What is reasonable is a question of fact, and six days

may be said to be reasonable: *Ajit v. Sammy* [1967] 1 AC 255; and

(4) Where, from the nature of the contract, time may be said to be the essence thereof, for example:

(a) mercantile contracts (*Reuter v. Sala* [1879] 4 CPD 239 at 249);

(b) contracts for the sale of leaseholds (*Hudson v. Temple* [1860] 29 Beav 536 at 534);

(c) an option to buy shares which fluctuate in value (*Hare v. Nicoll* [1966] 2 QB 130);

(d) a colliery business (*Macbryde v. Weekes* [1956] 22 Beav 533); and

(e) a public house as a going concern (*Lock v. Bell* [1931] 1 Ch 35).

(See also *Chin See Yin, supra*, per Abdul Malik Ishak J (now JCA)).

[15] Bearing in mind the above principles, we note that in the instant appeal, the consideration for the property was to be fulfilled by the transfer of the shares, and cl. 3 of the SPA expressly provides that "The sale and purchase shall be completed on or before 31 December 1980". It is abundantly clear to us that under cl. 3, the parties have expressly stipulated and agreed on the date of completion. That stipulation was couched in peremptory language, and required the mandatory completion of the sale and purchase on or before 31 December 1980. The intention of the parties was to complete the sale and purchase of the property on or before 31 December 1980. Hence, we hold that pursuant to cl. 3, the parties have agreed that time was of the essence thereof.

Acquiescence And Waiver

[16] The next point put forward for the defendant was that the plaintiff's conduct had shown acquiescence and, consequently, the plaintiff had waived the stipulation that time was the essence of the SPA.

[17] It was stressed for the plaintiff that there was neither acquiescence nor waiver by the plaintiff in relation to the time.

[18] In our view, this issue of acquiescence and waiver is to be determined by reference to the evidence adduced at the trial. The finding of facts by the High Court revealed that in relation to the defendant's failure to transfer the shares to Madam Ng on or before the completion date, Ch'ng Beng Leong (SD1) has given several contradictory versions *viz*:

(1) that during his lifetime, the late Ch'ng Gim Chuan had refused to transfer the shares to Madam Ng;

(2) that the late Ch'ng Gim Chuan had paid RM43,000 to Madam Ng;

(3) that the company's secretary, one Mr Kong Sin Heng, had not carried out his duties to effect the transfer at the material time; and

(4) that SD1 was waiting for the grant of letters of administration for the estate of Ch'ng Gim Chuan (dec'd).

[19] To extricate himself from the melee of these contradictory versions, SD1 had created what he considered was the "correct reason" ie, the company secretary's dereliction of duties. As SD1 was obviously a witness who had a purpose of his own to serve, his contradictory versions had not been viewed favourably by the trial court.

[20] On the other hand, the letter dated 13 October 1987 issued to the defendant by Messrs Tan Bak Lee & Co., the (then) solicitors for Madam Ng, had notified the defendant that:

(1) the defendant was obliged to transfer the shares to Madam Ng on or before 31 December 1980;

(2) the defendant's failure to transfer the shares to the plaintiff has resulted in the breach of the SPA by the defendant; and

(3) the defendant was required to give an account for rentals of the property and to re-surrender vacant possession of the same to the plaintiff.

[21] Given the above scenario, we agree with the finding of the

Court below that no acquiescence and waiver could be attributed to Madam Ng. A

[22] On the facts, the validity of the SPA could be impugned on grounds of failure of consideration and fundamental breach, in addition to uncertainty of contract. These grounds deserve a more detailed discussion below. B

Failure Of Consideration And Fundamental Breach

[23] The defendant's failure to transfer the consideration (the shares) to Madam Ng constitutes a total failure of consideration on the part of the defendant, in so far as the SPA is concerned. The defendant had never parted with the consideration for the property, and so the contract expressed in the SPA attracts the application of the first limb of s. 40 (but not the exception thereto). Section 40 merits reproduction *in extenso* as follows: C D

> **40. Effect of refusal of party to perform promise wholly**
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance. E

[24] The defendant's failure or refusal to transfer the shares to Madam Ng on or before the completion date came squarely within the first limb of s. 40. Madam Ng has received nothing that she has bargained for in the SPA. There was total non-performance by the defendant of the obligation ie, the promise relating to the transfer of the shares to Madam Ng under the SPA. Madam Ng, being the promisee, may put an end to the SPA, and the defendant should not be unjustly enriched under the SPA by retaining the property. F G

[25] An illustration of a total failure of consideration is to be found in *Mistaria Sdn Bhd v. Evergreen Furniture Industries Sdn Bhd* [1999] 1 LNS 127 HC, where not a single cent has been paid towards the purchase consideration for the sale and purchase agreement of a business and the shareholders agreement. H

[26] The essence of time in the SPA comes under s. 56(1) and the failure of consideration is within the ambit of s. 40. Section 40 must be read conjunctively with s. 56(1) when determining whether the defendant as a promisor has committed a breach of I

such a nature that goes to the root of the contract ie, a fundamental breach: *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269, per Zulkefli Makinudin FCJ at p. 277 D; and per Gopal Sri Ram FCJ at p. 286 H. The words "his promise in its entirety" in s. 40 are singularly significant, as the non-defaulter's right to repudiate a contract accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of the promise: per Gopal Sri Ram FCJ in *Berjaya Times Square, supra*, at p. 286A-B.

[27] Under the SPA, the defendant has the contractual obligation to perform ie, to transfer the shares to Madam Ng on or before 31 December 1980. The defendant's non-performance of that obligation struck at the very root, foundation or substratum of the SPA. The transfer of the consideration is a 'fundamental term', a breach of which constitutes a fundamental breach, ie, the failure by one party (the defendant) to perform a primary obligation which has the effect of depriving the other party (Madam Ng) of substantially the whole benefit which it was the intention of the parties that she should obtain from the SPA: See *Photo Production Ltd v. Securicor Transport Ltd* [1980] 2 WLR 283, 294 HL per Lord Diplock. The defendant's fundamental breach had deprived Madam Ng of the fundamental benefits under the SPA. That fundamental breach entitled the innocent party (Madam Ng) to rescind the contract and to have the parties restored to a position where they will stand as if the contract (the SPA) had never been made ie, the return of the property by way of *restitutio in integrum* to Madam Ng: (See *Berjaya Times Square Sdn Bhd, supra*, at p. 281 B per Gopal Sri Ram FCJ), and, upon her death, to her estate.

[28] There is at common law a right to rescind a contract in very limited circumstances. In essence, it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration: *Berjaya Times Square Sdn Bhd, supra,* 282 I FC per Gopal Sri Ram FCJ, applying *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] AC 32, 48 HL per Viscount Simon LC.

[29] The common law right to rescind and the quasi-contractual remedy of restitution have been applied in:

(1) *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 LNS 213: A house purchaser had entered into an agreement

with the developer who was to complete the house within 24 months but at the material time the developer had not constructed the building. The developer had not done any of the things it had promised to do within the time specified in the contract. The High Court granted the equitable remedy of rescission in favour of the purchaser.

(2) *Tan Yang Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 HC: Several purchasers had, pursuant to an agreement to purchase a house with vacant possession within 36 months from the date of the agreement, made payments to the developer. The developer had never constructed the house at all, and had failed or refused to perform his promise in its entirety within the 36 months, even until the date of the trial of the purchasers' action. Shankar J (as he then was) followed *Chye Fook & Anor, supra*, and held that there was a total failure of consideration, and granted the purchasers' claim for a declaration that they were no longer bound by the agreement, with a consequential order, *inter alia*, for a refund of the sums paid by them.

(3) *Law Ngei Ung & Anor v. Tamansuri Sdn Bhd* [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44 HC: There was an abandonment of the project by the developer due to the developer's failure to complete the complex in which the purchaser had purchased a shop lot. The High Court granted rescission by reason of total failure of consideration and directed a *restitutio in integrum* by way of a refund of the monies the purchaser had paid the developer.

Uncertainty In Contract

[30] The defendant's contention, that Madam Ng had, by acquiescence, agreed that the transfer of the shares to her was to be deferred to an unspecified date, clearly militates against its own case. That contention unequivocally leads to the result that the date of the transfer was to be kept at large or postponed *ad infinitum*. The words "to be deferred to an unspecified date" create an element of uncertainty in the contract, and so s. 30 is to be invoked. This section reads as follows:

30 Agreements void for uncertainty

A Agreements, the meaning of which is not certain, or capable of being made certain, are void.

[31] Illustrations of agreements which have been rendered void on grounds of uncertainty include:

B (1) *King's Motors (Oxford) Ltd v. Lax* [1969] 3 All ER 665, where Burgess V-C held that an option clause in a lease for a further term "at such rental as may be agreed upon between the parties", in the absence a relevant arbitration clause, and in the absence of agreement between the parties, was void for C uncertainty. (See also: *Smith v. Morgan* [1971] 2 All ER 1500, 1504 per Brightman J).

(2) *Zainal Abidin v. Century Hotel Sdn Bhd* [1986] 1 LNS 2 SC: A similar option clause appeared in a tenancy agreement. Seah D SCJ (as then was), speaking for the (then) Supreme Court, held that the option clause did not give rise to any legal obligation on the part of either party unless and until the lessee gives notice in writing to the lessor, within the stipulated period, of his intention to extend the lease and the parties have mutually E agreed to the new rent. Until these two conditions are satisfied, the option clause could not be legally enforced against the lessor.

(3) *Wisma Sime Darby Sdn Bhd v. Wilson Parking Malaysia Sdn Bhd* F [1996] 4 CLJ 194 CA: The focal point there revolves around a similar option clause in the written three-year tenancy agreement for a car park. The tenant gave notice in writing within the stipulated period of the intention to exercise the option to renew the tenancy but made no mention of the rental G for the proposed new term. Eventually, in response to the landlord's invitation to make an offer in respect of the rental in competition with others who had been invited to tender for the tenancy, the tenant made an offer. The tenant's tender was not accepted and the existing lease was extended for two months to H enable the tenant to wind up the car park operations. The landlord then issued a writ seeking a declaration that the tenancy had been lawfully determined, vacant possession and damages. The High Court dismissed the landlord's action. In allowing the landlord's appeal, VC George JCA (as he then I was) speaking for this Court followed *King's Motors (Oxford) Ltd, supra*, and *Zainal Abidin, supra*, and held, *inter alia*, that the

option clause for a further term at 'a rent to be agreed' was void for uncertainty as the agreement provided no machinery or formula which the courts can utilize to ascertain what is otherwise unascertainable without the parties coming to an agreement.

[32] In the instant appeal, our finding that the SPA is void would brings into focus s. 66 which provides for the obligation of the defendant, as the person who has received advantage under the SPA, as follows:

> **66. Obligation of person who has received advantage under void agreement, or contract that becomes void**
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[33] Section 66 specifies the remedy of restitution or compensation in favour of Madam Ng. The defendant having taken possession of the property and having been in occupation thereof is legally bound to restore it, or to make compensation for it, to Madam Ng from whom the defendant had received the property.

Conclusion

[34] By reason of the above, this appeal was devoid of merits and dismissed with costs of RM5,000 to the plaintiff. The decision of the learned judicial commissioner was affirmed. Deposit to the plaintiff on account of the fixed costs.